

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In re:) MM Docket No. 92-266
)
Implementation of Sections of) CS Docket No. 96-60
the Cable Television Consumer)
Protection and Competition Act of 1992)

Leased Commercial Access

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MAY 31 1996

REPLY COMMENTS OF ESPN, INC.

ESPN, Inc. ("ESPN") hereby submits these Reply Comments in the above captioned proceeding. ESPN filed comments in the initial round of this rulemaking recommending that the Commission adopt a rate formula that does not unjustifiably subsidize leased access programmers. Specifically, ESPN encouraged the Commission to retain the highest implicit fee rate formula. In the alternative, ESPN urged the Commission to mitigate the disruption the proposed cost/market rate formula would have on business relationships between non-leased access programmers and cable operators and the resulting frustration of consumer expectations. Like many other commenters in this proceeding, ESPN strongly believes that the proposed cost/market rate formula would create a significant but unwarranted subsidy for leased access programming that would otherwise not generate sufficient consumer demand to merit carriage on cable systems.

Having reviewed the comments submitted in this proceeding, ESPN continues to believe that the Commission should retain the highest implicit fee formula it earlier

adopted. In the event, however, that the Commission believes that the current formula must now be discarded to encourage expanded use of leased access capacity, the Commission should adopt the "average channel rate plus markup" approach proposed in the National Cable Television Association, Inc. comments ("NCTA Comments"). While any pricing structure other than one set by market forces will likely result in some form of subsidy to leased access programmers, the average channel plus markup formula has several advantages over the Commission's cost/market rate formula.¹

ESPN agrees with an important point made in the NCTA Comments -- and in the comments of numerous other parties -- that the new cost/market rate formula disregards one of the most important elements of a cable operator's "opportunity costs," *i.e.*, those costs associated with substituting less desirable programming for programming that has "earned" its place on the cable system through programmer investment. While any formulaic approach to rate setting can act as no more than a surrogate for market-driven rates, the Commission's proposed cost/market rate formula is even further removed from marketplace realities by its overly constricted view of a cable operator's opportunity costs.

Therefore, rather than abandon the implicit fee approach completely, ESPN urges the Commission to adopt the "average channel rate plus markup" approach set out in the NCTA Comments. In addition to serving as a more appropriate proxy or surrogate for market-driven rates, this approach has the advantage of being less complicated to

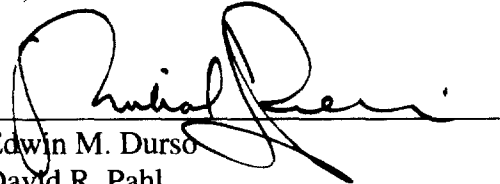
¹ Comments jointly filed by Adelphia Communications Corporation, Century Communications Corp., Falcon Holding Group, L.P., Insight Communications, Inc. and Lenfest Communications, Inc. also recommend an average rate plus markup formula.

implement than the Commission's cost/market rate formula. In addition, there would be no need for an operator to place in its public files a "hit list" of vulnerable programmers. As ESPN and other commenters noted, the availability of such a list would likely be devastating to new programmers struggling to gain widespread carriage.²

For the reasons set forth in its initial comments, ESPN urges the Commission to retain the highest implicit fee concept earlier adopted. However, if the Commission sees no alternative other than discarding the current formula, it should adopt the average implicit fee plus markup approach set out in the NCTA Comments. Whatever the formula, however, ESPN continues to urge the Commission to attempt to mitigate the harm that any non-market driven rate formula will have on existing and emerging non-leased programmers that have invested in non-subsidized carriage on cable systems.

Respectfully submitted,

ESPN, Inc.

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² On a related issue, ESPN objects strongly to the recommendation of ValueVision International, Inc. that cable operators be required to make public their contracts with programming services -- apparently without regard to any confidentiality provisions that these might contain. See Comments of ValueVision International, Inc. at p. 13. Although ValueVision uses the OVS proceeding to justify this intrusion, ESPN notes that the Commission's proposal in that proceeding did not contemplate the public availability of underlying program license agreements, only agreements between OVS operators and video programming providers. ValueVision's attempt to obtain access to these often confidential program license agreements should be rejected by the Commission.